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NATIONAL RAILROAD PASSENGER CORPORATION
dba AMTRAK, JONATHAN STASKA, DENISE HOGG,
and MICHAEL JOHN TORRENCE, and BNSF RAILWAY
COMPANY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

RANDY LEE HALL,

Plaintiff,

v.

NATIONAL RAILROAD PASSENGER
CORPORATION ("AMTRAK");
JONATHAN STASKA, Engineer Driver;
DENISE HOGG, Conductor; MICHAEL
JOHN TORRENCE, Assistant Conductor,
BNSF RAILWAY COMPANY; and
DOES 1 through 50 inclusive,

Defendants.

Case No. 3:19-cv-02312-WHA

**DEFENDANTS' OBJECTION TO
VACCINATION REQUIREMENT**

Hon. William H. Alsup

Trial: December 6, 2021

1 In response to the Court's order requiring the parties to file any objection to the Court's
 2 ground rules regarding vaccination and trial testimony [Doc. 179], defendants submit the
 3 following objection.

4 The Court has issued the following order regarding vaccination status [Doc. 179]:

5 To reiterate, any witness or party who is unvaccinated will not be allowed
 6 in the courtroom. Any witness who is not vaccinated may appear live by
 7 video from a remote location or counsel may designate passages from the
 8 witness deposition to be offered at trial. The burden is on the side offering
 9 the witness to work out the details of presenting a witness live by video.
 10 This can be done by contacting Tana Ingle at
 11 tana_ingle@cand.uscourts.gov. The Court does not guarantee that video
 12 will be available. [¶] All jurors will have to be fully vaccinated. [¶] **Any
 13 objection to the ground rules must be filed no later than November 30,
 14 2021 at 2:00 PM.**

15 Preliminarily, defendants understand and appreciate the Court's jury vaccination
 16 requirement from a public health perspective. However, for the reasons below, defendants
 17 respectfully object to the Court's requirement (i) that jurors be vaccinated and (ii) that defense
 18 liability witness Brian Heikkila must testify remotely by video, with the Court's caveat that the
 19 Court cannot guarantee that the internet connection will allow for video testimony.

20 In order to create a written record, defendants object to the Court's order excluding from
 21 the pool of prospective jurors all individuals not vaccinated against COVID-19. The Seventh
 22 Amendment's guarantee of the right of trial by jury includes the basic principle of impartiality of
 23 jury selection in both civil and criminal cases. *See Thiel v. Southern Pac. Co.*, 328 U.S. 217, 220
 24 ("The American tradition of trial by jury, considered in connection with either criminal or civil
 25 proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the
 26 community.") Requiring the jurors to be vaccinated will prejudice defendants' right to a fair trial
 27 by depriving defendants of a jury composed of a representative cross-section of the community.

28 Second, defendants object to the Court's order requiring defendant's liability witness,
 Brian Heikkila, to testify remotely due to his vaccination status. Even if video testimony is
 available, requiring defendants' sole expert and critical witness on the issue of train handling --
 which is the sole remaining liability issue -- to testify remotely, while plaintiff's expert will be

1 permitted to testify live in open court due solely to his vaccination status, prejudices defendants.

2 Rule 43(a) of the Federal Rules of Civil Procedure generally requires that witness
 3 testimony at trial occur live in open court, absent “good cause in compelling circumstances and
 4 with appropriate safeguards.” But there is no dispute that “virtual reality is rarely a substitute for
 5 actual presence and that, even in an age of advancing technology, watching an event on the screen
 6 remains less than the complete equivalent of actually attending it.” *U.S. v. Lawrence*, 248 F.3d
 7 300, 304 (4th Cir. 2001). “Video conferencing . . . is not the same as actual presence, and it is to
 8 be expected that the ability to observe demeanor, central to the fact-finding process, may be
 9 lessened in a particular case by video conferencing. *Thornton v. Snyder*, 428 F.3d 690, 697 (7th
 10 Cir. 2005). Further, the jury will undoubtedly speculate as to why Mr. Heikkila is not testifying
 11 in-person. For these reasons, requiring Mr. Heikkila to testify remotely, even if by video,
 12 prejudices defendants, particularly because defendants expect to offer the testimony of only two
 13 witnesses (Mr. Staska and Mr. Heikkila) and because plaintiff’s liability expert, Mr. Rubenstein,
 14 will be permitted to testify in-person. Given the Court’s order that Brian Heikkila must testify
 15 remotely, defendants request an instruction advising the jury that remote testimony shall be
 16 treated equally as in-person testimony.

17 Again, defendants recognize the purpose of the Court’s order from a public health
 18 perspective but must object to create a record.

19
 20 Respectfully submitted,

21 Dated: November 29, 2021

22 ALLEN, GLAESSNER,
 23 HAZELWOOD & WERTH, LLP

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 26 Alexei N. Offill-Klein
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